Nos. 92-5184, 92-5188, and 92-5257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WAYNE EUGENE WALKER, JOE GUERRA, AND
ROBERT WAYNE BOUVIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether a solution of methamphetamine and chemicals is a "mixture or substance containing a detectable amount of methamphetamine," for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1, without regard to whether the solution is ingestible or marketable.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 4299-4308,[1] is reported at 960 F.2d 409.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. The petitions for a writ of certiorari were filed on July 21, 1992 (Nos. 92-5184 and 92-5188) and on July 23, 1992 (No. 92-5257). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the petition appendix in No. 92-5184.

STATEMENT

After a trial in the United States District Court for the Western District of Texas, petitioners Walker and Guerra were convicted of conspiracy to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846, and of possession of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After entering a guilty plea, petitioner Bouvier was convicted of conspiracy to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Walker was sentenced to 288 months' imprisonment, to be followed by five years' supervised release. Petitioner Guerra was sentenced to 235 months' imprisonment, to be followed by five years' supervised release. Petitioner Bouvier was sentenced to 210 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed all three convictions and sentences.

1. Petitioners and others engaged in a conspiracy to manufacture methamphetamine that culminated with their arrests in February 1990. Officers of the Austin, Texas, Police Department seized various quantities of methamphetamine during their investigation of petitioners' drug ring. In addition, the officers discovered the methamphetamine laboratory itself at a private residence. The officers seized a 54.5-pound liquid mixture at that laboratory. A government expert testified at trial that the liquid mixture contained detectable amounts of methamphetamine and phenylacetone (otherwise known as P2P, a precursor controlled

substance used to manufacture methamphetamine). The expert acknowledged that the mixture most likely was left over from a methamphetamine "cook" and that it was not then in a usable state, although the phenylacetone could be distilled from the mixture and used to manufacture additional methamphetamine, and "seventy-five percent of the weight of phenyl acetone could be converted into methamphetamine." 6/5/91 Tr. 142. The expert estimated that the mixture contained around 1% methamphetamine, and the parties stipulated at petitioner Bouvier's sentencing hearing that solvents made up at least 95% of the mixture. Pet. App. 4301; 7/18/91 Tr. 4-5; 6/5/91 Tr. 136-139, 141-143.

2. An issue at each sentencing hearing involved the quantity of methamphetamine that should be considered under the Sentencing Guidelines. Petitioners argued that the court should consider only 146 grams of methamphetamine seized during the investigation leading to this prosecution. According to petitioners, the additional 54.5-pound mixture seized at the methamphetamine laboratory should not be included because it was waste material that could not be ingested or marketed. The district court rejected that argument and sentenced petitioners based on the weight of the mixture as well as the remaining methamphetamine. See 7/9/91 Tr. 42-43, 50-51; 7/18/91 Tr. 7, 13-14; Gov't C.A. Br. 4.[2]

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[2] Inclusion of that amount resulted in base offense level of 36 (although petitioner Bouvier inexplicably was given a base offense level 34), which applies to "[a]t least 10 KG but less than 30 KG of Methamphetamine." Sentencing Guidelines § 2D1.1(c)(4). While petitioners now claim that excluding the 54.5 pounds would

3. The court of appeals affirmed. Pet. App. 4299-4308. In addition to rejecting several other challenges that petitioners do not renew here, the court held that petitioners had properly been sentenced based on the weight of the 54.5-pound liquid mixture as well as the remaining amounts of methamphetamine seized during the investigation. Id. at 4301-4302. The court relied on its "consistent[]" holdings that sentencing courts should consider "the total weight of a liquid substance containing methamphetamine in calculating [a] defendant's base offense level, despite the fact that most of the liquid was waste material." Ibid. (citations omitted). Contrary to petitioners' claim that these holdings were "effectively overruled" by Chapman v. United States, 111 S. Ct. 1919 (1991), the court held that "much of the language in Chapman supports" prior Fifth Circuit case law. Pet. App. 4302.

ARGUMENT

The court of appeals correctly held that the weight of a mixture containing detectable amounts of methamphetamine and P2P must be factored into the drug quantities used to determine

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have resulted in "astronomical[ly]" lower sentences, e.g., 92-5184 Pet. 4, that assertion assumes that the remaining 146 grams were not "actual" (or in the words of the former Guideline, "pure") methamphetamine. See Sentencing Guidelines § 2D1.1 n.* (1989 and 1991 versions). Although the district court's inclusion of the 54.5-pound mixture obviated the need for proof on this point, the remaining 146 grams undoubtedly were substantially purer than the 54.5-pound mixture. Assuming that at least 100 grams of the seized methamphetamine qualified as "actual" or "pure" methamphetamine, petitioners' base offense levels would have been 32. See Sentencing Guidelines § 2D1.1(c)(6) The difference between the top of Offense Level 32 and the bottom of Offense Level 36 is between 40 and 60 months' imprisonment across all of the Criminal History categories -- which, while not insignificant, is not "astronomical," as petitioners suggest.

petitioners' Guidelines sentences. Given this Court's past treatment of similar cases, there is no basis for further review.

1. The Sentencing Guidelines provide that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Sentencing Guidelines § 2D1.1(c) n.*, at 82 (Nov. 1, 1991). See also id. n.1, at 83 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841"). With respect to methamphetamine, the Sentencing Guidelines, as well as the statute, specifically reinforce the notion that sentencing may be based either on the weight of the actual drug itself or on the weight of the entire mixture or substance containing a detectable amount of the drug. Sentencing Guidelines § 2D1.1(c) (basing penalties either on the weight of "Methamphetamine (actual)" or on a ten-fold greater weight of the entire mixture containing a detectable amount of methamphetamine). See also 21 U.S.C. 841(b)(1)(A)(viii) (establishing ten-year minimum sentence for traffickers of "100 grams or more of methamphetamine * * * or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine"). The Sentencing Guidelines explain in this regard that:

> The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined

> by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.

Sentencing Guidelines § 2D1.1(c) n.*, at 82 (Nov. 1, 1991).

There is no exception, either in the statute or the Sentencing Guidelines, allowing the exclusion of a "mixture" containing detectable amounts of controlled substances on the ground that the mixture consists principally of "waste material" or is not "ingestible" or "marketable."

2. Petitioners rely on Chapman v. United States, supra, to argue that the courts may count the weight of a material only if it is ingestible or marketable. In fact, this Court's decision in the Chapman case supports the Fifth Circuit's ruling in this case.

This Court held in Chapman v. United States, supra, that LSD-infused blotter paper is a "mixture or substance" for purposes of 21 U.S.C. 841(b), so that the weight of the blotter paper as well as the drug itself must be considered in calculating a defendant's sentence under that law and the Sentencing Guidelines. This Court held that because neither the statute nor the Sentencing Guidelines define the terms "mixture" or "substance" and because those terms did not have an established meaning at common law, they must be given their "ordinary" dictionary meanings. Chapman, 111 S. Ct. at 1925 (citation omitted). Although the Court did not consider how the term "substance" should be defined, it noted that the term "mixture" is defined "to include 'a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.'" Id. at 1926 (quoting Webster's

Third New International Dictionary 1449 (1986)). The Court added that "[a] mixture may also consist of two substances blended together so that the particles of one are diffused among the particles of the other." Ibid. (quoting 9 Oxford English Dictionary 921 (2d ed. 1989)).

This case fits comfortably within those dictionary definitions of a "mixture." The methamphetamine and chemicals in the solution were "thoroughly commingled [yet] are regarded as retaining a separate existence," Chapman, 111 S. Ct. at 1926, and were "blended together so that the particles of one are diffused among the particles of the other," ibid. Moreover, in explaining why LSD and blotter paper constitute a mixture, the Court in Chapman listed several factors that apply fully to the methamphetamine solution in this case: the "LSD crystals are inside of the paper so that they are commingled with it"; the "LSD is diffused among the fibers of the paper"; and the LSD "cannot easily be distinguished from the blotter paper, nor easily separated from it." 111 S. Ct. at 1926.

The only distinguishing factor between this case and Chapman is that, while the solution here was not proved to be ingestible or consumable, "[l]ike cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug." 111 S. Ct. at 1926. Yet, the Court did not hold in Chapman that ingestibility is a necessary element of the definition of a "mixture," and the Court's analysis

in that case suggests that it is not.[3] The petitioners in Chapman had argued against a dictionary definition of the term "mixture" by suggesting that giving that term such an interpretation would lead to the "nonsensical" inclusion of "carriers like a glass vial or an automobile in which the drugs are being transported." Id. at 1926. The obvious response, were ingestion critical, is that cars and glass vials are not intended to be consumed together with the drugs. The Court, however, followed a different tack, id. at 1926 (emphasis added):

> The term ["mixture"] does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a "container." The drug is clearly not mixed with a glass vial or automobile; nor has the drug chemically bonded with the vial or car. It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug.

3. Petitioners are correct that there is disagreement among the courts of appeals on the correct interpretation of the phrase "mixture or substance" for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1 in cases in which the material at issue is not ingestible or consumable, unlike the LSD-infused blotter paper at issue in Chapman. The First Circuit has held that

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[3] Whether or not an item is consumable may bear on whether it is a "substance" within the meaning of the statute and the Sentencing Guidelines. For example, a drug capsule and the powder it contains are not a "mixture," but the capsule qualifies as a "substance" containing the drug in powdered form, and the total weight of the capsule should be considered at sentencing. The language in Chapman thus may establish that LSD and blotter paper together are both a "mixture" and a "substance."

courts must count "as a "mixture" the entire weight of a suitcase made from chemically bonded cocaine and acrylic[4] and of a statue made from cocaine and beeswax.[5] The First Circuit's decisions are consistent with the Fifth Circuit's decision in this case and also with pre-Chapman decisions by the Third, Fifth, Ninth, and Tenth Circuits, ruling that the entire weight of a "mixture or substance" must be counted, even if only a small portion is a consumable drug and the bulk of the mixture consists of nonconsumable precursor chemicals or by-products.[6] By contrast, in post-Chapman decisions the Second, Sixth, Ninth, and Eleventh Circuits have recently considered and expressly rejected that position. Those courts have

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[4] United States v. Mahecha-Onofre, 936 F.2d 623, 625-626 (1st Cir.), cert. denied, 112 S. Ct. 648 (1991); United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992).

[5] United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), cert. denied, 112 S. Ct. 955 (1992).

[6] E.g., United States v. Beltran-Felix, 934 F.2d 1075 (9th Cir. 1991) (solution containing methamphetamine not in a distributable state was nonetheless a "mixture or substance" for sentencing purposes), cert. denied, 112 S. Ct. 955 (1992); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991) (methamphetamine solution); United States v. Callihan, 915 F.2d 1462, 1463 (10th Cir. 1990) (94-pound mixture containing only 2.95 kilograms of phenyl-2-propanone; the remainder was unreacted chemicals and by-products); United States v. Touby, 909 F.2d 759, 772-773 (3d Cir. 1990) (100-gram slab containing only 2.7% pure 4-methylaminorex (Euphoria)), aff'd on other grounds, 111 S. Ct. 1752 (1991); United States v. McKeever, 906 F.2d 129, 133 (5th Cir. 1990) (phenylacetone), cert. denied, 111 S. Ct. 790 (1991); United States v. Mueller, 902 F.2d 336, 345 (5th Cir. 1990) (liquid acetone containing methamphetamine); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989) (statute and Sentencing Guidelines required a sentence based on total weight of 38-1/2 pound mixture that contained only small amount of methamphetamine), cert. denied, 111 S. Ct. 82 (1990); United States v. Baker, 883 F.2d 13, 15 (5th Cir.) (40-pound solution containing only a small amount of methamphetamine), cert. denied, 493 U.S. 983 (1989).

held that only the weight of a consumable or ingestible mixture may be counted and that if a drug is found in a nonconsumable solution, only the weight of the pure drug may be considered for sentencing purposes, even if the combination of materials would be deemed a "mixture" under the ordinary meaning of that term.[7]

Nonetheless, we do not believe that review is warranted in this case. We did not oppose certiorari in Mahecha-Onofre because the courts of appeals have taken divergent approaches on the issue whether the term "mixture or substance" is limited to materials that are ingestible or consumable, as was the LSD-infused blotter paper in question in Chapman. This Court, however, declined to review that question in Mahecha-Onofre and in two other cases last Term. See Mahecha-Onofre v. United States, 112 S. Ct. 648 (1991); Beltran-Felix v. United States, 112 S. Ct. 955 (1992); Fowner v. United States, 112 S. Ct. 1998 (1992). Petitioners' claim for an exception to the plain meaning of the term "mixture or substance" is not materially different from the claims advanced by the petitioners in those cases. Because nothing has changed since this Court denied review in those cases, there is no reason to treat these petitions differently.

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[7] United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (mixture of cocaine and cornmeal); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992), and United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (solution of cocaine and creme liqueur); United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (solution of cocaine and wine); United States v. Jennings, 945 F.2d 129, 134-137 (6th Cir. 1991) (solution containing methamphetamine that was not in a consumable state); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (cocaine suspended in an unidentified and assumed unusable liquid).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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